No. 86-598

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,
Petitioners,

—*v.*—

ANACONDA-ERICSSON INC., ERICSSON, INC., L M ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANKING CORPORATION, CITIBANK, N.A., PRICE WATERHOUSE, SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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CITATIONS TO OPINIONS BELOW

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-598

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

Petitioners,

v.

ANACONDA-ERICSSON INC., ERICSSON, INC., L M ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANKING CORPORATION, CITIBANK, N.A., PRICE WATERHOUSE, SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

In its unanimous opinion affirming the District Court's grant of summary judgment for defendants and entry of an injunction prohibiting plaintiffs or their counsel from further litigation regarding Teltronics Services, Inc., the Court of Appeals noted, "Plaintiffs and their attorneys seem to believe that if at first you don't prevail, sue, sue again" (Pet. 39a). This petition is the latest confirmation of that observation. The

claims which petitioners are again attempting to assert have been litigated repeatedly and repeatedly found to be devoid of merit over the past seven years. *See*, in addition to the opinions in this action, *Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985); *Anaconda-Ericsson, Inc.* v. *Hessen (In re Teltronics Services, Inc.)*, 29 Bankr. 139 (Bankr. E.D.N.Y. 1983); *Teltronics Services, Inc.* v. *L M Ericsson Telecommunications, Inc.*, 486 F. Supp. 836 (S.D.N.Y.), *on reargument*, 491 F. Supp. 538 (S.D.N.Y. 1980), *aff'd*, 642 F.2d 31 (2d Cir.), *cert. denied*, 452 U.S. 960 (1981); *Teltronics Services, Inc.* v. *L.M. Ericsson Telephone Co.*, No. 79 Civ. 1233, slip op. (S.D.N.Y. May 9, 1979).

Before instituting this action, but after claims based on the same course of conduct had been dismissed in three prior actions, petitioners' attorneys brought an action alleging substantially identical claims on behalf of both Teltronics and Edward M. Beagan, the founder, former president and largest stockholder of Teltronics. The District Court, unanimously affirmed by the Court of Appeals, entered an injunction against Beagan and petitioners' attorneys prohibiting further prosecution by them of claims belonging to Teltronics. *See Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985). In this case, petitioners' attorneys attempted to prosecute the same claims against many of the same defendants on behalf of other Teltronics shareholders. As Judge Neaher noted in denying their motion to reargue, "Plaintiffs' attorneys have offered no reason why other shareholders (plaintiffs herein) should be treated differently with respect to the same claims" (*infra* p. 13a).

Petitioners misinform this Court about the facts and the record below. For instance, they fail to mention or to provide this Court with the District Court's opinion denying plaintiffs' and plaintiffs' attorneys' motion to reargue,[1] which completely

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1 A copy of Judge Neaher's opinion on reargument, dated December 2, 1985, is annexed as Appendix A.

belies their contention that they were denied their due process rights. Petitioners assert that the District Court entered an injunction against them *sua sponte*, without notice or an opportunity to be heard (Pet. 12). In fact, the injunction was granted pursuant to a motion filed by defendants in November 1983 (Pet. 18a, 30a). Petitioners had over 19 months to respond to defendants' motion—during which time they failed to explain to the court why the injunction should not issue—and a further opportunity to contest the injunction during a conference before the District Court on September 24, 1985 (*infra* p. 13a). Judge Neaher noted, "Despite these opportunities to explain themselves, [petitioners' attorneys] have offered nothing to justify their conduct, which wholly disregards the results of the prior proceedings." *Id.* The Court of Appeals, in affirming the injunction, stated, "The record clearly justifies such relief" (Pet. 39a).

An equally egregious distortion of the record below is petitioners' implication that the Court of Appeals affirmed an award of sanctions under Rule 11 against their attorneys. *See* Petition at *i*, Question 5. The Court of Appeals never ruled on the sanctions issue. As the court explained (Pet. 39a):

> "The imposition of costs and attorney's fees under Rule 11, Fed. R. Civ. P., is not before us at this time, although appellants chose to brief the issue. When appellees moved to adjourn the briefing and argument of this appeal until the amount of such costs and fees was finally determined by the district court, appellants opposed on the ground that an appeal from such a determination might not be taken. Because we denied appellees' motion, the Rule 11 issue is clearly not before us."

A subsequent appeal by petitioners' attorneys from the award of sanctions was dismissed by the Court of Appeals for lack of jurisdiction, due to petitioners' failure to file a timely notice of appeal, on September 2, 1986.

Petitioners' failure to provide this Court with the opinion of the District Court on reargument and their mischaracterization

of the record are in themselves sufficient reasons for denying the Petition. *See* Sup. Ct. R. 21.1(k)(ii), 21.5.

SUMMARY OF ARGUMENT

Many of the questions that petitioners suggest for the Court's consideration are not presented by the decision of the Court of Appeals with respect to which they seek certiorari. The Court of Appeals' opinion is in accord with the decisions of this Court and the other courts that have addressed the same issues and does not raise any point meriting review by this Court.

ARGUMENT

I.

THE SANCTIONS PURSUANT TO RULE 11

The judgment as to which petitioners seek certiorari does not present any issue relating to Rule 11. The Court of Appeals did not rule upon the District Court's award of sanctions against petitioners' attorneys pursuant to Rule 11. As the Court of Appeals stated, "The Rule 11 issue is clearly not before us" (Pet. 39a).

II.

THE INJUNCTION AGAINST FURTHER LITIGATION

The Courts of Appeals have consistently recognized "[t]he equity power of a court to give injunctive relief against vexatious litigation" and repeatedly endorsed the use of injunctive power in circumstances similar to this case. *See Shuffman* v. *Hartford Textile Corp. (In re Hartford Textile Corp.)*, 681 F.2d 895, 897 (2d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983); *Gordon* v. *United States Department of Justice*, 558 F.2d 618 (1st Cir. 1977); *Ward* v. *Pennsylvania New York Central*

Transportation Co., 456 F.2d 1046, 1048 (2d Cir. 1972); *Clinton* v. *United States*, 297 F.2d 899, 901-02 (9th Cir. 1961), *cert. denied*, 369 U.S. 856 (1962); *Sperry Rand Corp.* v. *Rothlein*, 288 F.2d 245 (2d Cir. 1961); *Meredith* v. *John Deere Plow Co.*, 261 F.2d 121, 124 (8th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959). A federal court may enjoin further litigation in any court in the United States when the claimant's proclivity for vexatious litigation has been established by his attempt to relitigate claims that have been repeatedly shown to be meritless. *Shuffman* v. *Hartford Textile Corp. (In re Hartford Textile Corp.)*, *supra*, 681 F.2d at 897; *Ward* v. *Pennsylvania New York Central Transportation Corp.*, *supra*, 456 F.2d at 1048; *Sperry Rand Corp.* v. *Rothlein*, *supra*, 288 F.2d at 248-49.

The assertion that the injunction violated the due process protections required by *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), is patently without merit. As noted above, petitioners' attorneys received notice of defendants' motion seeking injunctive relief and numerous opportunities to be heard both before the motion was granted and in connection with petitioners' request for reconsideration. Petitioners have not suggested any plausible ground why the injunction barring them from continuing to harass respondents merits this Court's review.

III.

THE CLAIMS ASSERTED IN THE COMPLAINT

In part II of the petition, petitioners argue that their claims "were warranted by existing law or a good faith argument for the extension, *modification or reversal of existing law*" (Pet. 16) (emphasis in the original). This quotation from Rule 11 of the Federal Rules of Civil Procedure indicates that part II of the petition is intended to argue that the sanctions imposed on petitioners' counsel were not merited. That issue is not presented by the decision of which review is sought.

It is conceivable that petitioners also intend to argue that the dismissal of the complaint raises issues that should be reviewed by this Court. Certiorari is hardly merited, however, by the lower courts' failure to modify or reverse existing law to accommodate petitioners' claims, as discussed below.

A. The Rule 10b-5 Claim

The references in the petition to individuals who sold Teltronics stock (Pet. 2, 18) are misleading. Plaintiffs themselves have never sold their shares (Pet. 2, 20-21). They assert standing under Rule 10b-5 on the ground that an alleged misrepresentation that Teltronics had defaulted in Ericsson's press release issued on March 5, 1979 (Pet. 6) was the cause of Teltronics' bankruptcy proceedings in September 1979 (Pet. 17, 32a).

The District Court dismissed the Rule 10b-5 claim on the ground that the press release was not a proximate cause of the bankruptcy proceedings (Pet. 16a). The Court of Appeals agreed (Pet. 33a), but affirmed primarily on the basis that the commencement of bankruptcy proceedings did not constitute a "forced sale" of petitioners' stock (Pet. 34a). The holding that the commencement of insolvency proceedings does not constitute a forced sale of securities for purposes of Rule 10b-5 is in accord with the decisions of the other courts that have considered the question, *see Landy* v. *F.D.I.C.*, 486 F.2d 139, 159 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974); *Ingenito* v. *Bermec Corp.*, 376 F. Supp. 1154, 1177 (S.D.N.Y. 1974); *see also Davis* v. *United States Gypsum Co.*, 451 F.2d 659, 660 (3d Cir. 1971), and petitioners do not identify any decision to the contrary.

When bankruptcy proceedings were commenced against Teltronics in September 1979, it invoked the protection of Chapter XI of the Bankruptcy Act.[2] Significant alterations of

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2 *See Anaconda-Ericsson, Inc.* v. *Hessen (In re Teltronics Services, Inc.)*, 29 Bankr. 139, 144 (Bankr. E.D.N.Y. 1983). The proceedings were converted to a straight bankruptcy on April 30, 1980, *id.*, based

the rights of public investors were not permitted in proceedings under Chapter XI. *See SEC* v. *American Trailer Rentals Co.*, 379 U.S. 594, 614-15 (1965). The management elected by Teltronics' stockholders, including petitioners, remained in possession and the stockholders generally retained their right to elect new directors, *see, e.g., In re Potter Instrument Co.*, 593 F.2d 470, 475 (2d Cir. 1979); *cf. Saxon Industries, Inc.* v. *NKFW Partners*, 488 A.2d 1298, 1300-01 (Del. 1985) (under Chapter 11 of Bankruptcy Code). There is therefore no plausible basis for asserting that the commencement of Teltronics' bankruptcy proceeding could constitute a "forced sale" of petitioners' shares.

The separate determination that the alleged misrepresentation was not a proximate cause of the bankruptcy proceedings commenced six months later does not present any issue of general interest meriting this Court's review.

B. The RICO Claim

The Court of Appeals dismissed petitioners' RICO claim on the ground that it belonged to Teltronics and could therefore be asserted only by the corporation, and not the shareholders. As petitioners acknowledge (Pet. 22), the Court of Appeals followed the only other decision addressing the same question that is identified in the petition. *Warren* v. *Manufacturers National Bank*, 759 F.2d 542, 544 (6th Cir. 1985). The holding that stockholders lack standing to assert claims on their own behalf based on injuries to the corporation also is in accord with well settled principles of corporation law.

The Court of Appeals' decision is not in any way inconsistent with *Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S. Ct. 3275 (1985). In *Sedima*, the Court held that a RICO plaintiff need not allege either a distinct "racketeering injury" or prior convictions of the predicate felonies. The issue addressed in

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on the Bankruptcy Court's findings of misconduct by Teltronics' management, *see In re Teltronics Services, Inc.*, No. 79 B 2725 (CHG), slip op. at 82-86 (Bankr. E.D.N.Y. April 30, 1980).

Sedima relating to the *type* of injury that must be alleged to assert a claim under RICO is unrelated to the question of whether stockholders may assert claims based on injuries to the corporation. *See Warren* v. *Manufacturers National Bank*, 759 F.2d 542, 545 (6th Cir. 1985).

C. The Antitrust Claim

The Court of Appeals affirmed the dismissal of petitioners' antitrust claim on the basis of the principles established in this Court's most recent opinion on standing to assert such claims, *Associated General Contractors* v. *California Council of Carpenters*, 459 U.S. 519 (1983). In particular, the Court of Appeals noted this Court's approval of *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910), which dismissed an antitrust claim for lack of standing based on circumstances that are indistinguishable from this action. In *Loeb*, as in the present case, the plaintiff claimed to have been injured because the alleged violation of the antitrust laws drove a company of which he was a stockholder into bankruptcy and thereby reduced the value of his shares. 183 F. at 706-07. The Court of Appeals' dismissal of petitioners' antitrust claim was clearly in accordance with the decisions of this Court.

D. The Williams Act Claim

The only authority cited by petitioners to support their contention that the Court of Appeals erred in holding that the transaction on which petitioners rely did not constitute a "tender offer" subject to the Williams Act is an earlier decision of the same court, *Hanson Trust PLC* v. *SCM Corp.*, 774 F.2d 47 (2d Cir. 1985) (Pet. 25). In *Hanson Trust*, the Court of Appeals held that the principal criterion for determining whether a transaction constitutes a "tender offer" is whether it creates "a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal," *id.* at 57.

As petitioners acknowledge, the proposal by Ericsson that they assert was a tender offer was expressly conditioned on approval by Teltronics' stockholders following distribution of proxy material that had been submitted to the Securities and Exchange Commission (Pet. 24). Compliance with the disclosure requirements applicable to proxy material under section 14 of the Securities Exchange Act, 15 U.S.C. § 78*l*, would have ensured that the stockholders had ample information concerning the proposed transaction and opportunity to consider it. The assertion that such a transaction constitutes a tender offer is fatuous.

Conclusion

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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November 6, 1986

APPENDIX A

Opinion on Motion to Reargue

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83 CV 4268 (ERN)

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT G. SERVELLO,

Plaintiffs,

—against—

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE CO., NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

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MEMORANDUM AND ORDER

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NEAHER, *District Judge*

The case is again before the Court, this time upon plaintiffs' motion to reargue the Court's decision and order of August 30, 1985, which granted defendants' motion for summary judgment and awarded attorneys fees against plaintiffs' attorneys.

Plaintiffs' attorneys contest the Court's dismissal of their clients' claims. They also challenge the assessment of fees against them personally. Specifically, they ask for a specification of the charges of bad faith/misconduct which support the award of fees and for an opportunity to be heard on this matter at an evidentiary hearing. The Court will first address their contentions concerning asserted errors in dismissing plaintiffs' claims.

Typical of the manner in which plaintiffs' attorneys have pursued this case, in the memorandum of law in support of this motion at 5 they state,

> "Although this Court in its opinion (Op. pg. 17) apparently agrees with plaintiffs' argument that the conditions necessary for a "forced sale" exist in this case, it nonetheless argues—for the first time—not that the Ericsson press releases were not 'in connection with' the forced sale of plaintiffs' stock (which was the Court's holding in the *Beagan* case) but that the issuance of the press releases and defendants' subsequent attempts to perpetuate the collapse of plaintiffs' stock were not causally related to the forced sale of that stock. The concepts of 'proximate causation' and the 'in connection with' requirement are distinct and this Court is unclear in its opinion as to whether it has abandoned its earlier reliance on the 'in connection with' requirement which it used to dismiss plaintiffs' Rule 10b-5 claim in the *Beagan* case."

On the contrary, proximate causation is an integral aspect of the "in connection with" requirement.

> "The precise meaning of 'in connection with' is provided neither by section 10(b) [of the Securities and

> Exchange Act of 1934] nor rule 10b-5. The case law reveals that in order for this element to be satisfied there must be some causal relationship between the alleged deception and some consequent purchase or sale. Courts have spoken of this connection in terms of reliance and causation."

Liberty National Insurance Holding Co. v. *Charter Co.*, 734 F.2d 545, 555 (11th Cir. 1984) (citations omitted); *see Angelastro* v. *Prudential-Bache Securities Inc.*, 764 F.2d 939, 943 (3d Cir. 1985). In recognition of this requirement, speaking of the plaintiffs' claims in *Bennett* v. *United States Trust Co.*, 770 F.2d 308 (2d Cir. 1985), the Court of Appeals stated,

> "They fail to establish the necessary loss causation; there is simply no direct or proximate relationship between the loss and the misrepresentation. *See Bloor* v. *Carro, Spanbock, Rodman & Fass*, 754 F.2d 57, 61-62 (2d Cir. 1985)."

Id. at 314.

In this case the misrepresentation is alleged to be omissions in a press release issued in March 1979. Its relationship to plaintiffs' subsequent "loss", which occurred after Teltronics was ordered liquidated in April 1980, is remote. By analogy, the relationship between the press release and the asserted "forced sale" created through Teltronics' liquidation is similarly remote.

Also contrary to plaintiffs' argument in their memorandum of law, the Court did not conclude that the conditions for a forced sale existed in this case. Unlike the short form merger which occurred in *Vine* v. *Beneficial Finance Corp.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967), where the Court found a forced sale, after the misrepresentation alleged to have occurred here, plaintiffs had neither the right to judicial appraisal of their stock nor the option of selling it pursuant to a preexisting offer, nor any equivalent rights.

Furthermore, the liquidation of Teltronics did not convert plaintiffs' stock into a claim for cash. As the Court noted in *Vine*,

> "We do not have here a stockholder who refused to accept a fraudulent offer to purchase his stock but remains a stockholder in an existing corporation; whether to label this hypothetical person a 'seller' under the Rule is a much different question. Due to defendant's acts, Crown has now disappeared and plaintiff's stock has, in effect, been involuntarily converted into a claim for cash."

Id. at 634. Here, by contrast, plaintiffs could only exchange their stock for money from the Bankruptcy Court in the event money were available from the Teltronics estate for this purpose. In its prior order the Court merely refused to rule, as defendants had requested, that the liquidation of a corporation in bankruptcy can never result in a forced sale.[1] Further exposition of the concept would be a meaningless academic exercise, injecting dicta into a decision derived from the circumstances of this case. To summarize and reiterate: the Court finds that plaintiffs have not met the "in connection with"

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1 In the *Beagan* action, the Court observed that,

> "The fraudulent scheme alleged in the complaint consists of a plot to plunge Teltronics into bankruptcy. [Complaint] ¶ 120. Assuming the success of the plot as alleged in the complaint, the separation of Beagan or any other Teltronics' shareholder from their shares was hardly integral to bankrupting the corporation. Moreover the asserted misrepresentation contained in a press release, was that Teltronics had defaulted on loans from Nordic and Citibank. Although the default may have been excused, or Teltronics may have had a defense to a suit by the banks [or their successors in interest to the debt instruments], it nevertheless defaulted when it failed to make the interest payment on time. Beagan also cites an omission in that the press release failed to state that Teltronics had adequate assets to pay the loans. The availability of money would not preclude a default, and in these circumstances, the asserted solvency of Teltronics is irrelevant to the fraud alleged to have precipitated its rapid demise. That fraud was defendants' alleged promise to make the interest payments if Teltronics did not do so. Teltronics' possible State law claim for commonlaw fraud arising from this deceit has been settled. The attenuation between this misrepresentation and the securities involved in any subsequent sale, forced or otherwise, is apparent from the pleaded facts."

587 F. Supp. at 731-32. The instant complaint alleges the same facts and merits the same response.

requirement of § 10(b) or Rule 10b-5 and plaintiffs have not presented facts which establish a forced sale of their stock.

Having failed to persuade the Court of the viability of their securities fraud claims, plaintiffs' reargument concerning the RICO claim fails.[2] As the Court concluded earlier, plaintiffs present only one RICO predicate act. Moreover, as previously noted, any injuries to plaintiffs' shares in Teltronics resulted from activities (alleged fraud and antitrust violations) directed at Teltronics. But for plaintiffs' ownership of those shares in that corporation and that corporation's business relationships with Ericsson, plaintiffs would have no loss. As recently pointed out by Judge Edelstein, RICO is not available to shareholders to redress injuries done to their corporation. *Nordberg* v. *Lord, Day & Lord*, ____ F. Supp. ____, ____, 39/85 Star. Dec. 12, 28-31 (S.D.N.Y. 1985) (cases cited and discussed therein).[3]

Concerning plaintiffs' claim pursuant to § 14(e) of the Williams Act, the Court stands by its prior ruling that the motion papers disclose no tender offer.

> "Although the Williams Act does not define the term 'tender offer', the characteristics of a typical offer are well-recognized. They are described in the House Report of the Committee on Interstate and Foreign Commerce, which held hearings on the proposed Act.
>
> The offer normally consists of a bid by an individual or group to buy shares of a company—usually at a price

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2 For reasons which escape the Court (and defy logic), plaintiffs persist in attempting to persuade the Court that *Wilson* v. *Garcia*, 105 S.Ct. 1938, undercuts the Court's earlier analysis, 587 F. Supp. at 733, and presumably the analysis of *Durante Brothers, etc.* v. *Flushing Nat. Bank*, 755 F.2d 239, 248-49 (2d Cir.), *cert. denied*, 105 S.Ct. 3530 (1985), concerning the appropriate New York statute of limitations for a civil RICO suit. The RICO claim in this case was dismissed upon deficiencies in the merits and not upon any defense of the statute of limitations.

3 As Teltronics has settled all of its claims against Ericsson as part of a bankruptcy, there is no possibility of a shareholders' derivative RICO suit.

> above the current market price. Those accepting the offer are said to tender their stock for purchase. The person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain conditions are met.
>
> H.R.Rep.No. 1711, 90th Congress, 2d Sess., reprinted in [1968] U.S. Code Cong. & Admin. News, pp. 2811, 2811.

> "This definition of a conventional tender offer has received general recognition in the courts."

Kennecott Copper Corp. v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1206 (2d Cir. 1978). The alleged tender offers from Tsai and Loral Corp. never actually materialized, thus the parties never executed contingent provisions in which Ericsson would have acted as a "White Knight" to prevent the takeover of Teltronics. Ericsson's own negotiations to purchase stock from plaintiffs and Teltronics chief stockholder, Beagan, never contemplated a public solicitation of shares.

In construing § 14(d) of the Williams Act, the disclosure provisions, the Court of Appeals recently stated,

> "The borderline between public solicitations and privately negotiated stock purchases is not bright and it is frequently difficult to determine whether transactions falling close to the line or in a type of a 'no man's land' are 'tender offers' or private deals. . . . [S]ince the purpose of § 14(d) is to protect the ill-informed solicitee, the question of whether a solicitation constitutes a 'tender offer' within the meaning of § 14(d) turns on whether viewing the transaction in the light of the totality of circumstances, there appears to be a likelihood that unless the preacquisition filing strictures of that statute are followed there will be a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them."

Hanson Trust PLC v. *SCM Corp.*, 774 F.2d 47, 56, 57 (2d Cir. 1985). Through five private sales and one open market pur-

chase, Hanson had accumulated 25% of SCM's stock. After stating the above test, the Court advanced seven reasons or factors which illustrated why those transfers were not considered a tender offer.

Six of those factors parallel the instant case as follows: (1) the number of proposed sellers consisted of Edward Beagan and the Teltronics Board of Directors, which collectively held a substantial portion of the corporation's stock; (2) the proposed offerees knew or should have known about Teltronics financial condition and the security interest which Ericsson held in the equipment leases; (3) any pressure to sell indirectly originated from Ericsson's allegedly illegal activities against Teltronics in the marketplace; (4) there was no active or widespread advance publicity or public solicitation, which is one of the earmarks of a conventional tender offer; (5) the proposed purchase price was never a premium; and (6) Ericsson never proposed a purchase of outstanding shares. *See Beaumont* v. *American Can Co.*, ____ F. Supp. ____, ____, 45/85 Star. Dec. 220, 255-58 (S.D.N.Y. Nov. 6, 1985).

In their memorandum of law at 6, plaintiffs state,

> ". . . [T]he Court's ruling is contrary to the evidence in the record which clearly indicates that Ericsson has sought to acquire the stock of many of Teltronics' shareholders and had taken 'substantial steps', including the preparation of a letter by its attorneys, Sullivan & Cromwell, toward that end."

They do not identify the exhibit which contains this evidence and the Court cannot locate any such letter in the two volumes of documentary exhibits which accompany plaintiffs' original motion papers. From the context, however, the Court comprehends that this letter refers to an offer to buy made by Ericsson after the price of Teltronics stock had fallen. Nevertheless, prior to the default, the evidence discloses that Ericsson's proposal to acquire an equity interest in Teltronics never contemplated a tender offer. Plaintiff's Exh. F, Affidavit of Edward Beagan, ¶¶ 32-34, appendix at 499-500; plaintiff's Exh. Y. As Beagan further explains, negotiations consisting of

proposal and counterproposal continued, but no agreement was reached. Beagan Affidavit at ¶ 40, appendix at 502.

Perhaps the most vexatious and ill-founded claim repeatedly advanced by plaintiffs is that they have standing to sue Ericsson for alleged violations of the antitrust laws. Not unsurprisingly, they accuse the Court of having determined the facts in the context of summary judgment. They characterized the Court's finding that Ericsson's alleged activities were directed at Teltronics as "mistaken" because they contend that as shareholders the injury was direct and personal to themselves. Their reliance on *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982) is misplaced. As this Court noted in Beagan's action, 587 F. Supp. 729-30, the rules for antitrust standing are stated in the later case of *Associated General Contractors of California* v. *California Council of Carpenters*, 459 U.S. 897 (1983). Rather than undercutting established antitrust law, these rules reinforce the principle that shareholders are not the victims of activities, allegedly violative of the antitrust laws, which are directed at their corporation. Plaintiffs have not identified any activity which was violative of the antitrust laws and directed solely at them.

In a broad sweeping claim, plaintiffs also assert that Ericsson aimed its activities at plaintiffs to collapse the price of their stock. The facts and circumstances do not support such a conclusion. The price of the stock collapsed only after the default. Moreover, plaintiffs' entire theory of a conspiracy to depress the price of Teltronics stock ignores the undisputed facts. Beagan, undoubtedly with consent of Teltronics board members, several of whom are plaintiffs in this suit, gave Ericsson a secured interest in Teltronics assets, the ability to influence the acceleration of a substantial portion of the corporation's debts, and most importantly, the opportunity to profit from an acceleration of that debt. Once Citibank and Nordic American Bank had assigned their rights as holders of Teltronics loans, Teltronics owed the money directly to Ericsson. This situation gave Ericsson the significant interest it had desired in Teltronics, whether Teltronics stock traded for $9 a

share or $.09 a share. Undeniably, Ericsson had attained the functional equivalent of an equity position in Teltronics without ever purchasing a single share; consequently, the Court still fails to understand how depressing the price of Teltronics stock was necessary to the success of the alleged takeover scheme.

Plaintiffs' attorneys' response to the award of fees against them also misperceives the record. They accuse the Court of applying the equivalent of res judicata to bar their clients' claims on the basis of prior litigation. Nothing of the sort occurred. The instant plaintiffs raised the same claims raised by Edward Beagan and neither they nor their attorneys should be surprised that this Court dismissed their claims, in part, in reliance upon its prior exhaustive treatment of these matters. These claims were as meritless when raised by shareholder Beagan as they are when raised by any other Teltronics shareholder.

Additionally, nothing in this Court's decision suggests or permits the inference that plaintiffs' attorneys solicited Teltronics shareholders to sue Ericsson after this Court dismissed Beagan's lawsuit. The need or desirability for the multiplicity of actions filed by plaintiffs' attorneys has been attributed by them to unidentified "procedural reasons". Its effect has been to harass Ericsson which prevailed in a trial of many of these same issues in the Bankruptcy Court.

> "Under the law in this Circuit, to award fees under the bad faith exception a court must find clear evidence that the losing party's claims were 'entirely without color and made for reasons of harassment or delay or for other improper purposes.' The test is conjunctive and neither meritlessness alone nor improper purpose alone will suffice. Under this test, a claim is 'entirely without color' when it lacks any legal or factual basis. While there is no precise definition of 'improper purpose' it may be evidenced by conduct occurring either before or during trial."

Sierra Club v. *U.S. Army Corp. of Engineers*, ____ F.2d ____, ____ (2d Cir. October 28, 1985) (citations and footnote omitted).

This standard aptly characterizes plaintiffs' attorneys' opposition to Ericsson's motion for summary judgment in this action. Rather than opposing that motion, they should have agreed to the entry of judgment without prejudice to their rights to an appeal; thus saving defendants the costs and fees of preparing additional papers. The Court's sanction is limited and discretely applies only after the Court of Appeals rendered its decision published at 762 F.2d 185.

In considering the effect and sweep of the Court of Appeals' opinion, plaintiffs' attorneys refer to that appeal and the preceding district court litigation as the "Beagan" action or suit. In so doing, they conveniently ignore the remainder of the Court of Appeals' decision and its clear implications for the instant suit. For the reasons stated by this Court, the Court of Appeals affirmed this Court's and the Bankruptcy Court's approval of a settlement by Teltronics' bankruptcy trustee of Teltronics' claims against Ericsson. 762 F.2d at 189. Also for the reasons stated by this Court, the Court of Appeals ruled that Edward Beagan, and obviously his attorneys, had no authority to pursue claims settled by Teltronics' bankruptcy trustee. 762 F.2d at 189-90. Undoubtedly, this Court could not and would not enjoin Beagan from pursuing his own claims, but it did enjoin him from pursuing Teltronics' claims. Nevertheless, his attorneys, here plaintiffs' attorneys, appealed this Court's dismissal of Teltronics without seeking a stay of that injunction.[4] Relying on the same claims and the same allegations, they opposed the instant motion for summary judgment with nothing more than protestations that Ericsson's activities created liability to Teltronics' shareholders, the plaintiffs herein. The Court had already ruled to the contrary, and the

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4 Contrary to plaintiffs' attorneys' assertions, this Court never encouraged them to take an appeal on behalf of Teltronics.

subsequent motion papers and later case authorities have reinforced the correctness of the prior rulings.[5]

Significantly, too, plaintiffs' attorneys' manner of opposing the motion also evidences bad faith. They have not explained how or why the problems of an entity referred to as Datasaab, allegedly an Ericsson subsidiary, concerning illegal exports of technology to the Soviet Union relate to Teltronics or the plaintiffs. The documents submitted appear to be intended to disparage Ericsson as a predatory entity allegedly associated with another entity involved in espionage and to convince the Court that individuals allegedly having some connection to Ericsson were less than forthright to a Federal Judge in the District of Columbia. Mudslinging of this genre is inappropriate under Fed. R. Civ. P. 56 and cannot be tolerated. Such a tactic insults the intelligence of the Court because it suggests that irrelevant and prejudicial matters may influence the Court's decisionmaking.[6]

Also contrary to their complaints, plaintiffs' attorneys have not been denied procedural due process. Ericsson has repeatedly reiterated its motion for sanctions against plaintiffs' attorneys since the first motion in the Beagan action. *See Wang* v. *Gordon,* 715 F.2d 1187, 1190-91 (7th Cir. 1983). In the instant case, plaintiffs' attorneys accused Ericsson and its attorneys of bad faith conduct and called for sanctions against

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5 The prior proceedings concerning Teltronics in this Court and the Court of Appeals put plaintiffs' attorneys on notice that this action was so completely without hope of succeeding that pursuing the matter in this Court, beyond placing the case in an appellate posture, was vexatious to the defendants and indicative of bad faith. *See Glick* v. *Koenig*, 766 F.2d 265, 270 (7th Cir. 1985).

6 Plaintiffs' attorneys submitted their opposition papers (dated July 1, 1985) on July 5, 1985. Apparently, the references to Datasaab were intended to satisfy the RICO requirement of prior criminal convictions, as set out in *Sedima S.P.R.L.* v. *Imrex, Inc.*, 741 F.2d 482 (2d Cir. 1984). Although this requirement was rejected by the Supreme Court in that case on July 1, 1985, 105 S.Ct. 3275, in their subsequent papers, plaintiffs' attorneys have not withdrawn their references to exhibits related to Datasaab. The record discloses that Datasaab's activities have no legal or factual impact upon Ericsson's relationship(s) with Teltronics or these plaintiffs.

them. The Court's finding of bad faith rests upon the undisputed activities of plaintiffs' attorneys as evidenced by the events of record. They have had ample opportunity to address the Court in person and on paper.

Plaintiffs' attorneys appeared at a conference held on the record on September 24, 1985. At that time, they offered no explanation, other than zealous representation of their clients, of why they had opposed Ericsson's motion for summary judgment in light of this Court's prior rulings and the Court of Appeals' decision. Concerning the imposition of sanctions, their memorandum of law submitted in support of the motion to reargue is no more enlightening except to assert that the Court has denied them due process of law in imposing sanctions. Despite these opportunities to explain themselves, they have offered nothing to justify their conduct, which wholly disregards the results of the prior proceedings.

This Court dismissed all of the claims of shareholder Beagan on the merits. Plaintiffs' attorneys have offered no reason why other shareholders (plaintiffs herein) should be treated differently with respect to the same claims.[7] *See Wang* v. *Gordon*, *supra*; *compare United States ex rel. United States-Namibia*, *etc.*, v. *Africa Fund*, 588 F. Supp. 1350, 1352 (S.D.N.Y. 1984); *North American Foreign Trading Corp.* v. *Zale Corp.*, 83 F.R.D. 293, 298 (S.D.N.Y. 1979). They obstinately disagree with that dismissal and the reasons the Court advanced in support of it, insisting, in essence, that the Court does not understand the nature of the case or the law or asserted liabilities involved. Their remedy lies in an appeal and not in blind pursuit of some hope that the Court will depart from its prior rulings when confronting the same arguments previously rejected and the same authorities previously found either irrelevant or unpersuasive. *See In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) ("[D]ogged pursuit of a colorable claim becomes actionable bad faith once the attorney learns (or should have learned) that the claim is bound to fail.").

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7 Not only are the claims the same as were raised in the Beagan action, but many of the affidavits and documents submitted by plaintiffs' attorneys are the same, *viz*, Plaintiffs' Exhs. D, E, F, H, and K (including Exhs. N and O to Exh. K).

In sum, plaintiffs' attorneys have received the notice and opportunity to be heard required prior to the imposition of sanctions, *see Smiga* v. *Dean Witter Reynolds, Inc.*, 766 F.2d 698, 708-09 (2d Cir. 1985); *Hasty* v. *Paccar, Inc.*, 583 F. Supp. 1577, 1580 (E.D. Mo. 1984); *see also Eash* v. *Riggins Trucking, Inc.*, 757 F.2d 557, 571 (3d Cir. 1985) (en banc), and they have not shown that the sanction is unlawful, clearly erroneous based upon the record, or an abuse of the Court's discretion. *See Sierra Club, supra; United States* v. *Nesglo, Inc.*, 744 F.2d 887, 891 (1st Cir. 1984); *see also Tedeschi* v. *Smith Barney, etc.*, 579 F. Supp. 657 (S.D.N.Y. 1984), *aff'd*, 757 F.2d 465 (2d Cir. 1985) (per curiam); *Nemeroff* v. *Abelson,* 94 F.R.D. 136 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 652 (2d Cir. 1983).

Although not raised in their memorandum of law submitted in support of the instant motion, plaintiffs' attorneys, at the aforementioned conference, expressed confusion concerning the breadth of the injunction contained in the order and decision of August 30, 1985. The purpose of that injunction is to prohibit them from commencing any new lawsuits concerning Teltronics, (which the Court considers unlikely) and to prohibit them from further pursuing an action entitled, "Teltronics Services, Inc. and Edward M. Beagan against Telecom Equipment Corp. and Stephen R. Cohen, 83 CV 3740," which they filed in this Court. The injunction does not extend to filing an appeal in this matter and cannot be so misinterpreted.

On the basis of the foregoing, the motion to reconsider is in all respects denied. Accordingly, defendants have 20 days from the date of this order to submit their petition for fees in accord with this Court's order of August 30, 1985. Plaintiffs' attorneys will have 10 days thereafter to submit a response, if any.

SO ORDERED.

/s/ EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, New York
December 2, 1985

APPENDIX B

Designation of Corporate Relationships

Pursuant to Rule 28.1 of this Court, respondents submit this designation of corporate relationships.

1. Anaconda-Ericsson Inc. has been renamed Ericsson, Inc. It is a wholly-owned subsidiary of Ericsson North America Inc., which in turn is a wholly-owned subsidiary of L M Ericsson Telephone Company, a Swedish corporation whose shares are publicly held. L M Ericsson Telephone Company has subsidiaries throughout the world, but none of their shares are publicly traded in the United States.

2. Since the commencement of this action, the corporate name of respondent Nordic American Banking Corporation has been changed to DnC America Banking Corporation. DnC America Banking Corporation is wholly owned by Den norske Creditbank, a Norwegian corporation.

3. The parent company of Citibank, N.A. is Citicorp. The following is a list of subsidiaries and affiliates which are not wholly owned.

Agence Expression S.A.R.L.
Agence Touristique de Guyenne et Gascogne S.A.
AMBAC, Inc.
AP-Dow Jones/Quotron Co.
Arrendadora INCI, S.A. de C.V.
Auximar Voyages S.A.
Banco Centro Sud S.P.A.
Banco de Honduras S.A.
Banco Internacional de Colombia (Nassau) Ltd.
Banco Internacional de Colombia, S.A.
Bay Forest Lot 20
Boerum Court Associates
Brandts Clark Marine Ltd.

Brickell Biscayne Associates
BT Publications, Inc.
Burloak Financial Services Inc.
Cardholder Services Limited
Central Capital Market Sources, Inc.
Central Holdings Corp.
Channel Collections Ltd.
Channel Islands Transatlantic Investment Company in Health Care Equities
Channel Islands Transatlantic Investment Funds Limited
Citi-Reserve, Societe D'Investissement A Capital Variable
Citibank (Zaire) S.A.R.L.
Citibank Budapest RT
Citibank Espana S.A.
Citibank Financial Consultants Limited
Citibank-Maghreb
Citibelsa-Assurantiemaatschappij Financia Compagnie D'Assurances Finan
Citico
Citicorp Construction Limited
Citicorp Data Distribution, Inc.
Citicorp Insurance Brokers (International) Limited
Citicorp Insurance Brokers Limited
Citicorp Insurance Holdings Limited
Citicorp Underwriting Agencies Limited
Citicorp Y Rio-Banco de Inversion, S.A.
Citifin Espana, S.A. de Financiacion
Citifinance Limited
Citilease Internacional, S.A.
Citilease Syndication No. 1 Corp.
Citytrust Banking Corporation
Citytrust Finance Corporation
Citytrust Realty Corporation

Clarke Vickers (UK) Limited
Clarke Vickers Limited
Clarke Vickers Services Pty. Limited
Collateral Trust Corporation Limited
Commerce and Trade Bank Limited
Compagnie Bordelaise de Negotiations et de Gestion S.A.R.L.
Compagnie Franco-Americaine de Gestion Financiere
Compagnie Generale de Banque Citibank
Compania Exportadora Cityexport S.A.
D.C.F. Holdings S.A.
D.C.F. Services Limited
Datastruktur GMBH
Diners Assurances S.A.R.L.
Diners Club de France S.A.
Diners Club Limited, The
Diners Club Limited, The (Ireland)
Diners Selection S.A.R.L.
Diners Voyages S.A.
Diners World Travel Limited
DKM Consultants Limited
Dorchester on Rittenhouse Square Partners, The
Drury Lane Limited
Eagle II
Euclid Commercial Joint Venture
Euclid Golf Joint Venture
European Overseas Issuing Corporation S.A.
Famibank S.A.
Fil-Insure Brokers, Inc.
Financia Nederland N.V.
Financial Institutions Insurance Brokers Limited
Financial Reserve, Incorporated
Financiera Citicorp S.A.

Finders Limited
First Citicorp Leasing, Inc.
First Hemphill
Fraser Vickers Research Pte. Limited
FRMC Corporation
Fuji National City Consulting, Ltd.
Garfield Restoration, The
GKB Gerwerbekreditbank AG
Global Electronic Markets Company
Goldsboro Joint Venture
Groupe D'Etudes Techniques et Commerciales S.A.R.L.
Harrison Credit Group, Inc.
HCG Services, Inc.
Inmobiliaria Jiennense, S.A.
International Bank Limited
Island Finance Corporation
J & E Davy
J & E Davy Holdings Limited
J.N. Travers & Co. Limited
Kemp-Gee Holdings (Jersey) Limited
Kemp-Gee Nominees Limited
Kingsbrooke Co.
KKB Bank KGAA
KKB Lebensversicherung AG
Kredit-Und-Versicherungsvermittlungsgesellschaft MBH
Lake Terrace Associates
Leonine Administration Limited
Lexington Commons, The
Lexington Village, The
Maghreb Finance S.A.
Mandata GMBH Fur Rechtsbesorgung UND Inkasso
Marine Partners

Memo Services S.A.R.L.
Meridian Partnership Ltd.
Mission Park Corporation
Nigeria International Bank, Limited
Oak Forest Company
Olive Trees Venture
One Sansome Street Associates Inc.
Organization d'Information et de Securite pour
le Credit S.A.R.L.
Orient Pacific Capital Investment Corporation
P.N. Kemp-Gee Service Company
P.T. Citicorp Leasing Indonesia
P.T. Diners Jaya Indonesia International
Paddle Creek Enterprises, Inc.
Park West Construction Company
Partridge Hill Company
Quotnet (France) S.A.R.L.
Quotnet (Hong Kong) Limited
Quotnet (U.K.) Limited
Quotnet A.G.
Quotnet G.M.B.H.
Quotnet Services (Singapore) Pte. Limited
Quotnet Services Limited
Revue Signature S.A.R.L.
Rob Roy Country Club Village
Saudi American Bank
Schuyler Associates
SCI Sainte Madeleine I
SCI Sainte Madeleine II
Scrimgeour Kemp-Gee Management (Jersey) Limited
Scrimgeour Vickers & Co.
Scrimgeour Vickers Financial Futures Limited

Scrimgeour Vickers Financial Services Limited
Scrimgeour Vickers Insurance Brokers Limited
Scrimgeour Vickers Research Services Limited
Seccombe Marshall & Campion P.L.C.
Sita World Travel (London) Limited
SKG Management Limited
Sobelfac S.A.
Southern Syndicate, Inc.
Spar-Und Kreditbank Registrierte Genossenschaft MBH
Sperry New Holland Credit Corporation
Taiwan First Investment & Trust Co., Ltd.
Tiers of Laurel Lakes Limited Partnership, The
United Bank of Trinidad and Tobago Limited, The
Waka Vermogensverwaltungs GMBH
Woodglen Venture
200 West Holdings Corp.
808 Broadway Associates

4. Telecom Equipment Corp. has been renamed Telecom Plus International Inc. Tel-Plus Communications, Inc. is the only subsidiary of Telecom Plus International Inc. that is not wholly-owned. Siemens Aktiengesellschaft is a joint stockholder with Telecom Plus International Inc. in Tel-Plus Communications, Inc.